# Bank of Commerce Bhd v Sam Lim Fong & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–958 OF 1993
ARIFIN JAKA J
30 DECEMBER 1998

***Contract*** *— Guarantee — Co-sureties — Separate guarantees executed — Whether all sureties are jointly and severally liable*

***Contract*** *— Guarantee — 'Conclusive evidence' clause — Effect of clause in legal proceedings against guarantors — Recomputed statement of account issued under the guarantee — No evidence adduced to show a manifest error or fraud in statement of account — Whether court should accept statement*

The first and second defendants who were directors of Egret Industrial Co (M) Sdn Bhd ('Egret') executed separate guarantees in favour of the plaintiff in relation to various loans facilities granted by the plaintiff to Egret. Upon default by Egret in repaying the loans, the plaintiff appointed receivers and managers over the assets of Egret and commenced action against the defendants, claiming for the outstanding amount. The plaintiff's claim against the fourth defendant was struck off as the writ had expired and its claim against the third defendant was withdrawn. SP1 (witness for the plaintiff), in his evidence, had referred to a duly certified recomputed statement of the account ('P5') and confirmed the various amounts claimed by the plaintiff. The issues which arose in this case were whether: (i) the guarantees signed separately by the defendants were a joint and several guarantee; and (ii) the quantum of damages had been proved.

**Held,** allowing the claim:

(1) The defendants would be bound by the guarantees if the two guarantees could be read together as part of one transaction or if it could be shown that there was no intention that they were to sign one guarantee as co-sureties of a joint and several guarantee or that the requirement had been waived (see p 6D). On close scrutiny of the guarantees, it was apparent that the two guarantees did not either expressly or impliedly refer to each other. There was no other evidence to show that they were related. Therefore, the one transaction principle had no application in this case (see p 6E).

(2) At the time when each of the defendant signed the guarantee, he was aware that other persons would also sign a separate guarantee. It was, therefore, clear that there was no intention the defendants would sign a single guarantee (see p 7D). There was no evidence to show that either of the defendants would not have signed the guarantee separately if either of them knew that the other guarantors were to sign a separate guarantee (see p 7H). The defendants being the directors of Egret ought to have known

that their obligations under the guarantee were joint and several (see p 7H–I). Accordingly, the guarantees signed separately by the defendants were enforceable as a joint and several guarantee (see p 8A).

(3) The defendants had not adduced evidence to show that there is a manifest error or fraud in the recomputed statement of account (P5). Accordingly, the court accepted P5 which shows that the amount claimed by the plaintiff is accurate (see p 8F).

**[Bahasa Malaysia summary**

Defendan pertama dan kedua yang merupakan pengarah kepada Egret Industrial Co (M) Sdn Bhd ('Egret') telah melaksanakan jaminan-jaminan yang berlainan untuk plaintif berhubung dengan pelbagai kemudahan-kemudahan pinjaman yang diberikan oleh plaintif kepada Egret. Bila Egret gagal untuk membayar balik pinjaman-pinjaman tersebut, plaintif telah melantik penerima-penerima dan pengurus-pengurus ke atas aset-aset Egret dan memulakan tindakan terhadap defendan-defendan, menuntut untuk jumlah yang tertunggak. Tuntutan plaintif terhadap defendan keempat telah dibatalkan disebabkan writ tersebut telah tamat tempohnya dan tuntutannya terhadap defendan ketiga telah ditarik balik. SPI (seorang saksi plaintif), dalam keterangannya, telah merujuk kepada satu penyata akaun yang dikira semula yang telah disahkan ('P5') dan mengesahkan jumlah-jumlah yang dituntut oleh plaintif. Isu-isu yang timbul dalam kes ini adalah sama ada: (i) jaminan-jaminan yang ditandatangani secara berasingan oleh defendan-defendan adalah jaminan yang bersesama dan berasingan; dan (ii) kuantum ganti rugi telah dibuktikan.

**Diputuskan**, membenarkan tuntutan:

(1) Defendan-defendan adalah diikat oleh jaminan-jaminan tersebut jika kedua-dua jaminan tersebut boleh dibaca bersama sebagai sebahagian daripada satu transaksi atau jika boleh ditunjukkan bahawa tidak terdapat niat bahawa mereka akan menandatangani satu jaminan sebagai penjamin bersesama satu jaminan bersesama dan berasingan atau bahawa keperluan tersebut telah diketepikan (lihat ms 6D). Atas penelitian yang mendalam terhadap jaminan-jaminan tersebut, adalah jelas bahawa kedua-dua jaminan tersebut tidak, secara langsung atau tidak langsung, merujuk kepada satu sama lain. Tidak terdapat sebarang keterangan lain yang menunjukkan yang mereka adalah berhubungan. Oleh itu, prinsip satu transaksi tidak terpakai dalam kes ini (lihat ms 6E).

(2) Pada masa setiap seorang defendan menandatangani jaminan tersebut, beliau mengetahui bahawa penjamin yang lain akan juga menandatangani satu jaminan yang berasingan. Oleh yang demikian, adalah jelas bahawa tidak terdapat niat bahawa defendan-defendan akan menandatangani satu jaminan tunggal

(lihat ms 7D). Tidak terdapat keterangan untuk menunjukkan bahawa mana-mana daripada defendan tidak akan menandatangani jaminan tersebut secara berasingan jika mana-mana mereka mengetahui bahawa yang lain akan menandatangani satu jaminan yang berasingan (lihat ms 7H). Defendan-defendan yang merupakan pengarah kepada Egret sepatutnya mengetahui bahawa obligasi mereka di bawah jaminan tersebut adalah bersesama dan berasingan (lihat ms 7H–I). Oleh itu, jaminan-jaminan yang ditandatangani oleh defendan-defendan secara berasingan boleh dikuatkuasakan sebagai satu jaminan bersesama dan berasingan (lihat ms 8A).

(3) Defendan-defendan tidak mengemukakan keterangan untuk menunjukkan bahawa terdapat kesalahan atau fraud yang nyata dalam penyata akaun yang dikira semula (P5). Oleh itu, mahkamah telah menerima P5 yang menunjukkan bahawa jumlah yang dituntut oleh plaintif adalah tepat (lihat ms 8F).]

**Notes**

For cases on co-sureties, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1666–1667.

For cases on conclusive evidence clause, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1635–1638.

**Cases referred to**

*Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 (refd)

*Hansard v Lethbridge* (1892) 8 TLR 346 (refd)

*Indian Bank v Raja Suria & Ors* [1993] 2 SLR 497 (refd)

*Keith Murphy Pty Ltd v Custom Credit Corp Ltd* (1992) 6 WAR 332 (refd)

*K Mohan* (*Shook Lin & Bok*) for the first and second defendants.

*Ringo Low* (*Shamira Ali* with him) (*Soo Thien Ming & Nashrah*) for the plaintiff.

**Arifin Jaka J**: On 1 September 1993, the Bank of Commerce (M) Bhd, formerly known as United Asian Bank Bhd ('the plaintiff'), filed this suit against all the four defendants herein, praying for judgment against them as pleaded under para 17 of the amended statement of claim as follows:

(a) Under the overdraft facility, for payment of the sum of RM307,313 owing as at 30 April 1993 with interest thereon, at the rate of 12.25% per annum on daily rests calculated from 1 May 1993 until the date of full payment or realization;

(b) Under the term loan facility for payment of the sum of RM1,217,636.97 owing as at 30 April 1993 together with interest thereon, at the rate of 12.25% per annum on daily rests calculated from 1 May 1993 until the date of full payment or realization;

(c) Under the Export Credit Refinancing and Trust Receipt facilities for payment of the sum of RM818,775.75 owing as at 30 April 1993 together with interest at the rate of 12.25% per annum on daily rests calculated on the principal sum of RM734,940.10 from 1 May 1993 until the date of full repayment or realization; A

(d) The costs of this action; and

(e) Such further and other relief as deem fit and proper by this Honourable Court. B

The plaintiff's claim against the fourth defendant was struck off as the writ had expired. The claim against the third defendant was withdrawn. The trial, herein, only concerns the plaintiff's claim against the first and second defendants ('the defendants'). C

The facts are not really in dispute and are as follows. The first and second defendants were at the material time directors of Egret Industrial Co (M) Sdn Bhd ('Egret'). The defendants executed separate guarantees on 15 August 1990, in favour of the plaintiff. The guarantee executed by the first defendant is at p 16AB and the one executed by the second defendant D is at p 12AB. The plaintiff's claim against both the defendants is based on these two instruments. It is not disputed that both the guarantees are in relation to various loan facilities granted to Egret by the plaintiff, and the liability of both the defendants under the guarantees is limited to an amount not exceeding RM5m. Upon default by Egret in repaying the loan facilities, E the plaintiff appointed receivers and managers over the assets of Egret and, thereafter, commenced this action claiming the outstanding amount as pleaded under para 17 of the amended statement of claim as stated earlier in this judgment.

The relevant parts of the claim against the defendants in the amended statement of claim is para 12 which reads: F

> In consideration of the Total Banking Facilities extended by UAB to the Borrower, first, second, third and fourth defendants jointly and severally agreed to become guarantors for the borrower and have executed the following letters of guarantee in favour of UAB:
>
> (a) The first and second defendants have each executed separate letters of guarantee dated 15 August 1990; and G
>
> (b) The third and fourth defendants each have executed separate letters of guarantee dated 15 day of October 1990 ('the guarantee').

The relevant part of the defence reads:

> (4) Save that the first and second defendants executed separate letters of guarantee dated 15 February 1990 ('the said guarantees') in favour of United Asian Bank ('UAB'), the rest of para 12 of the statement of claim is denied. The first and second defendants contend that the said guarantees are not enforceable by the plaintiff herein as the plaintiff is not a party to the said guarantees. H
>
> (7) The first and second defendants contend and will contend at the trial of this action that the said guarantees are void/or unenforceable for want of consideration. I

The defendants also deny that the amounts claimed by the plaintiff are due and owing to the plaintiff by the borrower, ie Egret.

From the pleadings and the contentions of the parties, it can be gathered that there are two issues raised in this case, which are:

(a) Whether the guarantees signed separately on 15 August 1990 by the defendants can be construed as and amount to a joint and several guarantee; and

(b) Whether the quantum of damages has been proved.

I shall now proceed to consider these issues.

*Whether the guarantees are joint and several guarantee*

The defendants contend that the guarantees relied upon by the plaintiff cannot be construed and do not amount to a joint and several guarantee as the two guarantees signed separately by the defendants do not refer to each other, and that the guarantees do not identify the parties together with whom the joint obligation is being undertaken. The learned counsel for the defendants referred to the case of *Indian Bank v Raja Suria & Ors* [1993] 2 SLR 497, a decision of the Singapore Court of Appeal where the court had to consider the effect of two separate guarantees executed by the guarantors in favour of a lending bank as a security for facilities granted by the bank to a borrower. In that case, the lending bank ('the appellant') had granted an overdraft facility to a company called Wesmapack (S) Pte Ltd ('the company') which facility was to be secured, inter alia, by the personal guarantee of all seven directors of the company. The guarantee named all the seven directors who were required to sign the guarantee, as joint and several guarantors. However, as it turned out to be, only six directors signed the guarantee ('the first guarantee'). The seventh director signed, at a later date, a separate guarantee ('the second guarantee') which named only the seventh director as the guarantor.

The company was unable to settle the amount due under the facility as demanded and was subsequently wound up. The appellant, then demanded payment from all the seven directors on the basis that they were jointly and severally liable under the first and second guarantee, asserting that the first and second guarantee constituted one transaction. The claim was dismissed in the High Court and was confirmed on appeal to the Court of Appeal. It was contended by the appellant that the first and second guarantees were in fact agreed as one guarantee and they could be so treated. The court rejected this contention on the facts and circumstances of the case. At p 503 Lai Kew Chai J (delivering the grounds of judgment of the court) said:

> ... to accept the bank's arguments would be to open a way around the long standing principle that all the co-sureties of a joint and several guarantee have to sign the guarantee unless it is shown that there was no such intention or that the requirement had been waived.

Further down on the same page, his Lordship further said: A

> In the end, the appeal may be summarized as follows. The action by the bank was pleaded in para 3 of the amended statement of claim as based on the joint and several guarantee of the seven defendants as contained in the two documents. They therefore had to show that the two documents were in fact one guarantee. They were unable to do this because the guarantees did not refer to each other. B

The learned counsel for the defendants also contended that the joint and several liability of guarantors in a guarantee is dependent on the execution of it by all persons named as obligors. He referred to the Australian case of *Keith Murphy Pty Ltd v Custom Credit Corp Ltd* (1992) 6 WAR 332. In that case it was held, inter alia: C

> As a rule of construction, where obligations are assumed jointly or jointly and severally, the contract is dependent on the execution of it by all persons named as obligors.

It is apparent from the two cases cited by counsel for the defendants that the defendants, in the instant case, would be bound by the guarantees which they had signed separately if the two guarantees could be read together as part of one transaction or if it can be shown that there is no intention that they were to sign one guarantee as co-sureties of a joint and several guarantee or that the requirement has been waived. D

The first question to be answered, therefore, is whether on the evidence, it can be concluded that the two guarantees signed by the defendants separately can be treated as one transaction. On close scrutiny of the guarantees, it is apparent that the guarantees do not either expressly or impliedly refer to each other. There is no other evidence to show that these two guarantees are related to one another. I, therefore, find that the one transaction principle has no application in this case. E F

The second question which is related to the long standing principle that all the co-sureties of a joint and several guarantee have to sign the guarantee (*Indian Bank*'s case) is whether it can be shown in the instant case that there was no intention that the defendants would sign one guarantee or that such requirement that the defendants were to sign one guarantee has been waived. I will now advert to the evidence in this case to see whether there was no such intention or that the requirement that the defendants were to sign one guarantee has been waived. The second defendant in his evidence, said that he was not told at the time he signed the guarantee (see p 12AB) that the first defendant would not sign the same guarantee and that the first defendant would sign a separate guarantee. He also said that he was not given a copy of the guarantee. In cross-examination, he said that he was aware that one of the conditions for the loan granted to the company was that the guarantors were to sign joint and several guarantee. G H

This is, indeed, evidenced by the letter of offer for the facilities addressed to Egret, the borrower (p 7AB) which clearly stated all directors (which includes the defendants) were required to sign a joint and several I

guarantee. He also confirmed that he did not request to be supplied with a copy of the agreement which he signed.

The only witness for the plaintiff, Palagan a/l Manickam (SP1) its officer, in cross-examination said in respect of the guarantee to the effect that each of the guarantors signed separate guarantee and that there is no record to show that the guarantees were given to the guarantors. He, further, said in cross-examination that he disagreed with the suggestion of the defendants' counsel that the guarantee was a separate guarantee and not a joint and several guarantee.

On the evidence, I cannot accept the second defendant's contention that he did not know that the first defendant would not sign the same guarantee and that the first defendant would sign a separate guarantee. I am satisfied that he knew that, he and the first defendant would sign a separate guarantee. This is clearly so stated in the guarantee itself in the following form:

> ... either alone or jointly with any other person or persons I, Tey King ... jointly and severally guarantee ... .

At the time when each of the defendant signed the guarantee, he was aware that other persons would also sign a separate guarantee. It is, therefore, clear that there was no intention the defendants would sign a single guarantee.

I, therefore, find that the two separate guarantees executed by defendants on 15 March 1990 amount to a joint and several obligations on the part of both defendants.

The *Indian Bank*'s case decided by the Singapore Court of Appeal is distinguishable on the facts. In that case, the intention of the parties was that the seven directors had to sign on one contract of guarantee in which all the seven names of the guarantors appeared in the first guarantee. It was established by the evidence that two of the guarantors would not have signed the first guarantee if they knew that the seventh guarantor were to sign a separate guarantee which is the second guarantee. The intention of the parties there was that all seven directors would sign the first guarantee as joint and several guarantors.

In *Hansard v Lethbridge* (1892) 8 TLR 346 it was held that where a surety executes a document in the belief derived from its form that it will be executed by all the sureties named therein as persons who are to sign, he will be relief of his obligation if all the others do not sign.

It is clear on the authorities of the *Indian Bank*'s case and *Hansard*'s case that a guarantor would be relieved of his obligation if the other guarantors whose name appeared in the document do not sign the document. In the instant case, there is no evidence to show that either of the defendants would not have signed the guarantee separately if either of them knew that the other guarantors were to sign a separate guarantee. On the contrary, as what I had stated earlier, the defendants knew the other guarantors would sign a separate guarantee. On the strength of these separate guarantees, the loan was released to the Egret. The defendants

being the directors of Egret at the material time ought to have known that their obligations under the guarantee are joint and several. They cannot now be heard to say that they are not bound by the guarantee. To accept the defendants' contention that the guarantee is null and void under the circumstances and on the evidence in this case, would be to deny justice to the plaintiff. Accordingly, for the above reasons I hold that the guarantees signed separately by the defendants are enforceable as a joint and several guarantee.

*Quantum*

SP1, in his evidence, referred to P5, a copy of the recomputed statement of the account and confirmed the various amounts claimed by the plaintiff. The witness was not cross-examined on this account. The statement of account is duly certified as required under cl 14 of the guarantee, the relevant part of which states:

> I/we agree that a copy of the account of the Principal contained in the Bank's book of account ..... signed by the manager for the time being of the office at which such account shall be kept, or any office of the Bank, shall be conclusive evidence against me/us of the amount for the time being due to the Bank from the principal in any action or other proceeding brought against me/us upon this guarantee.

The question whether a conclusive evidence clause can be challenged is dealt with in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363 where the Court of Appeal held:

> Although guarantors are contractually precluded from requiring the bank to prove the accuracy of the certificate, the guarantors are not prevented from adducing evidence to show that there is a manifest error, or fraud, on the face of the certificate.

The defendants had not adduced evidence to show that there is a manifest error or fraud in the recomputed account (P5).

Accordingly, I accept P5 which shows that the amount claimed by the plaintiff is accurate.

On the above premise, I, therefore, find that both defendants are liable under the guarantee. Both defendants are ordered to pay to the plaintiff as follows:

(a) The sum of RM1,805,799.29 being the amount outstanding under the Term Loan Account as at 30 September 1997 together with interest at the rate of 12.25% per annum on daily rest on the principal sum of RM1,217,636.97 from 1 October 1997 until date of full and final payment;

(b) The sum of RM721,915.25 being the amount outstanding under the Trust Receipt & ECR Account as at 30 September 1997 with interest thereon, at the rate of 12.25% per annum on daily rest on the principal sum of RM254,868.96 from 1 October 1997 to date of full and final payment; and

A (c) The sum of RM94,832.49 being the amount outstanding under the overdraft account as at 30 September 1997 with interest thereon, at the rate of 12.25% per annum on daily rest from 1 October 1997 until full and final payment.

(d) Cost of the action to the plaintiff to be taxed.

B *Claim allowed.*

Reported by Tan Kah Bee

C

D

E

F

G

H

I